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FEDERAL COMMUNICATIONS COMMISSION
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In the Matter of	)	
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1998 Biennial Regulatory Review --	)	
Review of the Commission's Broadcast Ownership	)	MM Docket No 98-35
Rules and Other Rules Adopted Pursuant to Section	)	
202 of the Telecommunications Act of 1996	)	

REPLY COMMENTS OF THE WB TELEVISION NETWORK

THE WB TELEVISION NETWORK

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SUMMARY

The Commission's cable/ broadcast cross-ownership rule should be repealed. Indeed, since Congress has removed the underlying statutory basis for the rule and the rule has outlived its original purpose, the rule no longer serves the public interest and therefore the Commission has a statutory duty under Section 202(h) to repeal the restriction. Furthermore, the rule should be repealed because it makes it difficult for a new television broadcast network such as The WB, which shares some corporate linkage with a cable operator, to compete with the other national television broadcast networks in the distribution arena. Any rule which potentially stifles the ability of an emerging broadcast television network to compete contravenes the well-established public interest goal of promoting new television networks. However, if the Commission decides to maintain any version of the current rule, at a very minimum, the Commission must either tailor such a restriction much more narrowly than the current rule or establish a clear, targeted waiver standard for which an emerging network such as The WB would qualify.

Repeal of the dual network rule also is mandated by the public interest. Certain combinations that are now prevented by this rule, especially those involving an emerging network and an established network, could produce efficient economies of scale and marketing advantages without raising competitive concerns. Given that the operations of broadcast networks and cable networks may be combined and that a single cable programmer can offer multiple networks, the dual network rule unfairly restricts the competitiveness of broadcast networks. As beneficial combinations are currently forestalled by the continued operation of this out-of-date rule, thereby curbing broadcast networks' ability to keep pace in today's rapidly evolving industry, the rule must be repealed.

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REPLY COMMENTS OF THE WB TELEVISION NETWORK

The WB Television Network ("The WB"), by its attorneys, hereby submits the following reply comments in response to the above-captioned Notice of Inquiry. The WB, the fifth and fastest growing broadcast television network in the country,[1] is a limited partnership whose general managing partner is Warner Bros. Communications, a division of Time Warner Entertainment Company, L.P. ("TWE"). A separate division of TWE, Time Warner Cable, operates numerous franchised cable systems across the country. Consequently, the current cable/broadcast cross-ownership rules prevent The WB, unlike any of the other national broadcast networks, from holding even non-controlling attributable investment interests in affiliated local broadcast stations in many television markets.[2] Accordingly, The WB is uniquely impacted by

[1]The WB was launched on January 11, 1995, with two hours of prime time programming per week, carried by 48 affiliated stations nationwide. The WB is currently broadcasting nine hours of prime time programming on four nights, and carried by over 90 affiliated but independently owned local broadcast stations.

[2]Although numerous stations affiliated with The WB are controlled by entities other than TWE who hold a significant interest in the network, The WB does not own or control any stations itself. As described below, this situation limits the network's flexibility and could create a competitive disadvantage for the network.

proposals put forth in the comments involving the Commission's cable system/broadcast station cross-ownership restriction (hereinafter the "cable/ broadcast cross-ownership rule").[3]

Introduction

Since Congress has removed the underlying statutory basis for the Commission's cable/ broadcast cross-ownership rule,[4] it is now ripe for repeal. The current rule has outlived its original purpose and no longer serves the public interest because it limits the distribution options of a new television broadcast network such as The WB, which shares some corporate linkage with a cable operator, and could dampen competition with the other national television broadcast networks in the distribution arena. Any rule which could stifle the ability of an emerging broadcast television network to compete contravenes the well-established public interest goal of promoting new television networks and the Commission should now take this opportunity to repeal the cross-ownership rule in accordance with Congress' statutory directive in Section 202(h) of the Telecommunications Act of 1996.[5]

However, if the Commission decides to maintain any version of the current rule, or alternatively adopts a new provision with an analogous effect, at a very minimum, the Commission must tailor such a restriction much more narrowly than the current rule. In particular, the Commission should establish a clear, targeted waiver standard for which an emerging network such as The WB would qualify.

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[3]47 CFR §76.501(a).

[4]See Telecommunications Act of 1996, Pub. L. No. 104-114, 110 Stat. 56 (1996) at Section 202(i) ("1996 Telecommunications Act").

[5]Id. at Section 202(h) (requiring biennial Commission review of broadcast ownership rules and restrictions, and requiring repeal of any rule deemed no longer in the public interest).

I. The Cable-Broadcast Cross-Ownership Restriction Disserves the Public Interest and Should Be Repealed

The WB is a prime example of why the cable/broadcast cross-ownership rule must now be repealed. Due to its partial ownership by TWE, which also holds an interest in cable systems operated by a structurally separate division, The WB is currently unable to hold even non-controlling attributable investments in, much less own, local broadcast affiliates in many television markets. The WB's inability to own such stations limits its distribution options by denying it the flexibility to use such "owned and operated" stations to partially defray the large, up-front programming costs common to all television networks[6]. While it may be the case that The WB will elect not to own and operate broadcast facilities, The WB should not be denied the discretion to use such an ownership structure or to explore other investment options short of outright ownership. Because the economic viability of an emerging network such as The WB should never be hindered by the Commission's broadcast ownership rules, the public interest demands that the Commission's cable/broadcast cross-ownership rule now be repealed or substantially relaxed.

a. A Successful Broadcast Television Network Should Have the Ability to Own Affiliated Stations.

An emerging television network such as The WB should not be prevented by the Commission's broadcast ownership rules from also owning affiliated local broadcast televisions stations. Owned and operated stations are a strategic option that should remain available to every

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[6]A broadcast network's programming costs are truly staggering, having sky-rocketed as the competition between broadcast and cable networks for the limited pool of quality talent and programming escalates. For example, this past year NBC has agreed to pay $13 million per episode to retain the rights to ER, the most popular weekly television drama. ABC, CBS and FOX agreed collectively to pay the National Football League over $12.9 billion for the rights to carry NFL games over the next eight years.

broadcast network. Indeed, each of the other major national television broadcast networks has the flexibility to maintain owned and operated stations. This model has for decades proven successful and lucrative for the free, over-the-air television broadcast networks, but because of the Commission's cable/broadcast cross-ownership rule, it is a structure The WB is unable to emulate. The public interest is simply not served by having any rule that in effect denies an emerging broadcast network such as The WB the capability of owning and operating its own broadcast facilities.

b. Repeal of Cross-Ownership Rule Would Increase Programming Diversity and Competition by Facilitating the Emergence of Additional Networks.

Because the cable/broadcast cross-ownership rule could harm the ability of an emerging network such as The WB to compete on an equal footing, repeal is the only solution consistent with the Commission's findings that the public interest is best served by supporting emerging broadcast networks. This long-standing policy dates as far back as 1941 when the Commission first acknowledged the competitive benefits that additional broadcasting networks bring to "the market in which networks and stations meet advertisers, the market in which networks and stations meet listeners, and the intermediate or internal market where stations meet networks."[7] This acknowledgment led to the first network regulations[8] and in 1943, the Commission's approval of the mandatory spin-off of the NBC Blue radio network. In so doing, the Commission

[7] See Report on Chain Broadcasting, Commission Order No. 37, Docket No. 5060 (May 1941) at 48, modified, Supplemental Report on Chain Broadcasting (October 1941), appeal dismissed sub nom. NBC v. United States, 47 F.Supp. 940 (S.D.N.Y. 1942), aff'd, 319 U.S. 190 (1943).

[8] See FCC Regulations §§ 3.101-3.108 (1941).

concluded: "the transfer of the Blue Network . . . will mean a much fuller measure of competition between the networks for stations and between stations for networks."[9]

The Commission likewise applied this policy to television in 1953. In approving the merger of the then nascent ABC television network with the Paramount theater chain,[10] the Commission explicitly stated its concern over the "the continued dominance of NBC and CBS in network broadcasting and the reasons therefor, including the handicaps under which ABC has operated and its resultant inability to provide the amount of competition which might have been expected from its establishment as an independent network"[11] and "whether the merger . . . [would] stimulate competition and result in an over-all improvement of network service."[12] In finding the merger in the public interest, the Commission found that approval of the merger would allow ABC to "not only to improve its physical properties but also its program structure so as to compete with NBC and CBS."[13] This policy has been applied to promote emergence of additional television networks numerous time since,[14] including in 1993 when the Commission

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[9]Order Approving Transfer of NBC Blue Network, 10 FCC 212, 213 (1943).

[10]ABC-Paramount Merger Case, 8 RR 541(1953) (granting approval and licence transfer associated with the merger of a non-dominant television network (ABC) with a movie house company (United Paramount Theaters, Inc.) in order to provide it with the financial resources and business expertise in order to boost its economic ability to compete with the two dominant television networks (NBC and CBS)) at ¶¶ 95-117.

[11]Id. at ¶ 95.

[12]Id.

[13]Id. at ¶126.

[14]See, e.g., Network Broadcasting, Report of the Network Study Staff to the Network Study Committee (Oct. 1957), reprinted in Report of the House Committee on Interstate and Foreign Commerce, H.R. Rep. No. 1297, 85th Congress, 2nd Sess. (1958) (the Barrow Report);

waived for emerging networks the now repealed financial interest and syndication ("fin/syn") rules, acknowledging that emerging television broadcast networks provide for a greater level of competition to the established networks, increase services to the public, and contribute to the diversity of viewpoints and ideas.[15] Indeed, since 1993 the Commission has gone out of its way to assist the now well established Fox Network and its corporate siblings, including granting a request by Fox to except emerging networks from the fin/syn rules,[16] granting a waiver of the daily newspaper cross-ownership restriction,[17] and granting a waiver of the broadcast station foreign ownership restriction.[18] There is no reason why today's emerging networks should not be afforded similar latitude.

It is undeniable that support of emerging networks serves the public interest. The emergence of networks such as Fox, UPN and The WB have decreased the established networks' dominance by beneficially churning competitive forces in the areas of television affiliation, advertising and programming production. New networks limit leverage of the established

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Second Report and Order in Docket No. 12859, 34 FCC 1103 (1963); Report, Statement of Policy, and Order in Docket No. 20721, 63 FCC 2d 674 (1977); Network Inquiry Special Staff, New Television Networks: Entry, Jurisdiction, Ownership and Regulation, Final Report (Oct. 1980).

[15]See Evaluation of the Syndication and Financial Interest Rules, Second Report and Order, 8 FCC Rcd 3282 (1993) at ¶ 105 (exempting emerging networks from the former fin/syn rules).

[16]Id.

[17]Fox Television Stations, Inc., 8 FCC Rcd 5341 (1993), aff'd sub nom, Metropolitan Council of NAACP Branches v. FCC, 46 F.3d 1154 (D.C. Cir. 1995).

[18]Fox Television Stations, Second Memorandum Opinion and Order, 10 FCC Rcd 8452 (1995).

networks in dealings with existing and potential affiliate stations because with more networks, independent affiliates always have an alternative network with which to affiliate if the terms demanded by their existing network are too onerous. Likewise, with more networks, advertisers no longer need to worry about cartel-like advertising prices as they did when there were only three established networks. Finally, with the new networks, program suppliers are not held victims to monopsony purchasing power of the established networks.[19]

New broadcast networks also enhance viewing diversity by offering viewers a rich, innovative source of free, network-quality, prime-time programming. The WB takes great pride in its commitment to providing innovative and award-winning children's programming and in developing a prime-time lineup appealing to a younger-skewing audience while maintaining family-wide appeal. Moreover, The WB has also provided alternative and minority producers, writers and actors with a unique outlet for their creative material, unfettered by many of the

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[19]Commissioner Quello eloquently described the public interest benefits of emerging networks in 1995 in the context of foreign ownership of the Fox Network when he recognized:

> . . . Fox's contribution to the formation of a fourth network and to the financial health of both independent and affiliated television stations across the country. The fourth network has provided a source of competition to the three established national broadcast networks and their affiliates. At the same time, Fox has provided economic, programming, and marketing support to enable many independent UHF stations to achieve stability and profitability. Fox affiliates have become a significant source for children's, minority-oriented, and news programming. As an important side benefit, Fox has provided a national platform for minority producers, writers, actors and other members of the creative community. As the recent plethora of station affiliation realignments illustrates, Fox's presence also has enhanced the value and bargaining power of other networks' local affiliates in many markets. While other equitable factors independently justify our decision, we must not forget Fox's public interest contributions.

See Fox Television Stations, Second Memorandum Opinion and Order, 10 FCC Rcd 8452 (1995) (Separate Statement of Comm. Quello).

constraints encountered when dealing with one of the established networks. Emerging networks such as The WB also bolster outlet diversity by providing a solid programming, marketing and financial base to affiliates, which especially in medium and smaller markets tend to be formally marginal independent UHF stations. Indeed, in recent years, with the emergence of new national broadcast networks, independent stations have flourished as never before.

Repeal of the cable/broadcast cross-ownership rule would provide The WB with flexibility and the ability to explore creative financial arrangements, ranging from outright ownership to non-controlling investments. Repeal would allow The WB to establish a larger base of well-funded affiliates upon which to build the continued success of the network, thereby ensuring that the viewing public will continue to have access to a rich source of alternative network programming. Repeal would also allow The WB to invest in independent affiliated stations not located in the largest DMAs that may be struggling, thereby facilitating the availability of the benefits of alternative broadcast networks beyond the largest television markets. Finally, repeal is the only option consistent with the Commission's policy goal of allocating broadcasting resources to the highest value users and with the Commission's policy of leveling the playing field and then getting out of the way to let competition thrive.[20]

c. At A Minimum, the Commission Should Waive Application of Any Such Rule to An Emerging Broadcast Network Such as The WB.

Because of the important public interest in promoting the emergence of additional television broadcast networks such as The WB, if the Commission maintains any restriction on the

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[20] See, e.g., Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, Second Report and Order, 9 FCC Rcd 2348 (1994).

joint ownership of a cable system and a local broadcast station, then the Commission must also narrowly tailor such a restriction so that it does not disadvantage any such emerging network. At a bare minimum, possibly by using the emerging networks test previously used to exempt nascent networks from the now-repealed financial interest and syndication rules,[21] the Commission should establish a targeted waiver standard for which stations owned and operated by a new network such as The WB can easily qualify.

Further, if the Commission maintains any such rule, it should also narrowly construct the restriction to specifically target competitive concerns relating to the joint ownership and operation of a cable system and a broadcast station in the same market. For example, because concerns about the effects of concentration should only arise where a proposed combination affects the majority of a particular metropolitan area rather than a few scattered suburban communities, any such restriction should not restrict common ownership between broadcast stations and cable systems or clusters that serve no more than 35 percent of subscribers in TV station's DMA. Moreover, the Commission should allow common ownership between stations and larger cable systems in the same DMA, conditioned upon the separation of the local cable system and broadcast station managerial employees and operations. To address any concerns such cross-ownership may have on local advertising sales, the Commission could simply preclude combination advertisement deals. Finally, for any specific, proposed combination that raises competitive concerns outside of the protections that the Commission is able to justify in this

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[21]Evaluation of the Syndication and Financial Interest Rules, Second Request and Order, 8 FCC Rcd, 3282 (1993) at ¶99 (defining a "network" subject to the rules as any entity that provides more than 15 hours of prime time programming per week to affiliates reaching 75 percent of television households nationwide).

proceeding, the Commission should actively consult with (but ultimately defer to) the Department of Justice and/or the Federal Trade Commission and their review subject to the Hart-Scott-Rodino Antitrust Improvements Act.[22]

d. Repeal of the Cross-Ownership Restriction Would Not Cause An "Untoward Aggregation" of Network Power

The Commission must reject claims by the Network Affiliated Stations Alliance ("NASA") that repeal of the cable/broadcast cross-ownership restriction would harm the public interest by increasing broadcast network power. NASA asserts that repeal would greatly increase the economic power the major broadcast networks exercise over their local independent affiliated stations and further hasten the migration of quality programming from the major broadcast networks to broadcast affiliated cable networks.[23]

These concerns have little, if any, nexus with the cable/broadcast cross-ownership rule. What NASA is concerned about is not really cross-ownership of local stations and cable systems in the same market, but instead major broadcast network nationwide ownership of cable systems and cable networks. As to the issue of broadcast network/cable system cross-ownership, NASA's concerns are stale in that Congress and the Commission long ago addressed this issue and concluded that such a restriction does not serve the public interest.[24]

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[22]15 U.S.C. § 1511.

[23]NASA Comments at 20-21.

[24]See Implementation of Sections 202(f), 202(i) and 301(i) of the Telecommunications Act of 1996, Order, 11 FCC Rcd 15115 (1996).

As to the issue of migration of broadcast programming from off-air television networks to broadcast network affiliated cable networks, NASA's concern involves the major networks which have created their own cable programming services and has absolutely nothing to do with cross-ownership of local broadcast stations and cable systems. If NASA's membership has a problem with the major networks programming and marketing policies, such concerns are best expressed in their members' direct discussions and negotiations with their networks and not in this proceeding. Finally, as NASA's concerns are targeted only at the major established networks, such issues provide no basis whatsoever for maintaining the cross-ownership rule as applied to emerging networks, or, at the very least, should not deter the Commission from adopting a generous waiver standard so that an emerging network such as The WB easily qualifies.

II. The Commission Should Repeal The Dual Network Rule.

Congress has instructed the Commission to review all of its television broadcast ownership rules de novo, as a pure policy matter. As recommended by CBS and ABC,[25] the Commission should take this opportunity to repeal the dual network rule.[26] The rule, which was first established over fifty years ago, is no longer justified in light of prevailing market conditions.

Prior to 1996, the dual network rule prohibited a television broadcast station from entering into an affiliation agreement with a network that operated more than one broadcast TV

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[25]CBS Comments at 18-28, ABC Comments at 24-26.

[26]47 C.F.R. Sec. 73.658(g). In making this argument, The WB wishes to make it perfectly clear that it is only arguing this point on principle and does not contemplate or know of any transaction with another network or station group which might be subject to this restriction.

network, unless the networks were not operated simultaneously or there was no substantial overlap in the territories served. The 1943 Report on Chain Broadcasting, by which the Commission adopted the dual network rule, concluded that permitting an entity to operate more than one network might preclude new networks from developing and affiliating with desirable stations because those stations might already be obligated to the established network entity.[27] The Commission also was concerned that such combinations could give a network too much competitive power.[28]

Congress, in Section 202(e) of the 1996 Telecommunications Act, directed the Commission to revise the dual network rule to permit a television broadcast station to affiliate with an entity that maintains two or more broadcast networks unless such networks are composed of either (1) two or more entities that were "networks" as of the day of enactment, or (2) any such network and an English-language program distribution service that, on the day of enactment, provided 4 or more hours of programming per week on a national basis and reaching more than 75 percent of national television households.[29] The Commission subsequently revised its rule to reflect this directive,[30] but now should repeal the rule since it no longer serves the public interest.

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[27]See Report on Chain Broadcasting, Commission Order No. 37, Docket No. 5060 (May 1941) at 48, modified, Supplemental Report on Chain Broadcasting (October 1941), appeal dismissed sub nom. NBC v. United States, 47 F.Supp. 940 (S.D.N.Y. 1942), aff'd, 319 U.S. 190 (1943). The dual network rule as enacted in 1941 only applied to radio networks. It was extended by the Commission to cover television networks in 1946. See Amendment of Part 3 of the Commission's Rules, 11 Fed. Reg. 33 (Jan. 1, 1946).

[28]Id.

[29]1996 Telecommunications Act at § 202(e).

[30]See Implementation of Sections 202(c)(1) and 202(e) of the Telecommunications Act of 1996 - National Broadcast Television Ownership and Dual Network Operations, Order, 11 FCC

In today's television marketplace, just as with radio in 1977 (when the Commission determined that the dual network rule "had little positive impact and may in the future hinder competition and restrict diversity"),[31] the rule is ill-suited for its purpose. There no longer can be any valid concern about domination of programming by only one or two national networks given the presence of at least eight mainstream broadcast networks and scores of cable networks.[32] In addition to viewership being spread over an increasing number of programming outlets, programming distribution is not subject to the networks' control.[33] Overall, competition and programming diversity in the video industry has eviscerated the once-dominant position of the major broadcast networks, and a restriction on mergers, combinations or joint ventures involving existing networks which is explicitly based on curbing competitive abuses by one or two controlling sources of network programming simply no longer makes sense.

To the contrary, and as with elimination of the cable/broadcast cross-ownership rule, repeal of the dual network rule would increase diversity and competition. In particular, certain combinations involving an emerging network and an established network could produce

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Rcd 12374 (1996).

[31]See Commission Rules and Regulatory Policies Concerning Network Broadcasting by Standard (AM) and FM Broadcast Stations, Report, Statement of Policy and Order, 63 FCC 2d 674 (1977) at ¶34.

[32]It is important to realize the significant extent of viewer erosion that has been experienced by the established networks since the 1980/81 television season. At that time, ABC, CBS and NBC combined for an 85 audience share, but by the 1997/98 broadcast year their combined share was only half that, at 43.

[33]See Review of the Prime Time Access Rules, Report and Order, 11 FCC Rcd 546, 556 (1995) ("The networks and their affiliates do not dominate video programming distribution or the video programming market and are unlikely to do so without PTAR.")

efficient economies of scale and marketing advantages. Given that the operations of broadcast networks and cable networks may be combined (e.g., Disney's ownership of ABC and ESPN, among other cable outlets), and that a single cable programmer can offer multiple networks (e.g., Home Box Office's numerous HBO channels), the dual network rule unfairly restricts broadcast networks. To the extent that this rule continues to apply, and especially in light of its application solely to the broadcast context, beneficial combinations are forestalled, thereby curbing broadcast networks' ability to keep pace in a rapidly evolving industry.[34] Indeed, now more than ever the Commission must permit the broadcast networks sufficient flexibility to adjust to changing competitive conditions.

Finally, Congress has not precluded the Commission from eliminating the rule. Unlike other instances where the Commission's discretion has been limited by an underlying statute,[35] Congress has never codified the dual network rule. Accordingly, the Commission is permitted to rescind the rule, a fact it implicitly acknowledged by requesting comment on whether the rule continues to serve the public interest.[36] Instead, Section 202(e) is merely instructive as a regulatory ceiling on the operation of the dual network rule, and does not relieve the Commission of its obligation to review the rule or limit the Commission's ability to expunge the rule altogether. Section 202(h), on the other hand, directs that the Commission must

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[34]Such efficient combinations should be allowed as long as there is a pledge to keep both networks in operation for some minimum, but not short term, period of time.

[35]See Golden West Associates, L.P., 59 RR 2d 125 (1985) at ¶¶ 15-21 (acknowledging that the Commission does not have the authority to grant a waiver of a cross-ownership rule that has been expressly codified by Congress).

[36]Notice of Inquiry at ¶24.

review each and every broadcast ownership rule biennially. Moreover, to the extent the Commission is unable to articulate how any such rule continues to serves the public interest, it must be eliminated. Accordingly, since there is no legitimate basis for retaining the rule and no restriction on the Commission's ability to eliminate this antiquated relic from a bygone era, the Commission must repeal the dual network rule altogether.

Conclusion

For the reasons set forth above, The WB urges the Commission to repeal the cable broadcast cross-ownership restriction, or at the very least adopt flexible waiver criteria that allow a nascent television broadcast network such as The WB to qualify, and to also repeal the dual network rule.

Respectfully submitted,

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